

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER COMPANY )  
 )  
Proposed revisions to delivery services ) 01-0432  
Tariff sheets and other sheets. )

ILLINOIS POWER COMPANY'S  
MOTION TO STRIKE CERTAIN PORTIONS OF THE  
INITIAL BRIEF OF COMMISSION STAFF

Illinois Power Company ("Illinois Power" or "IP") moves to strike certain portions of the Initial Brief of Commission Staff in this docket as constituting or containing substantive evidentiary material that was not submitted for the record or admitted into evidence in this case. The specific portions of Staff's Initial Brief that should be stricken are the following:

- i. Page 74, second paragraph (starting with "'Appendix B provides information . . .") through page 79, end of the first full paragraph (i.e., ending with ". . . within the Company's proposed DST tariff"), including footnotes 8 and 9, but excluding the last sentence of the carryover paragraph on page 79 (i.e., the sentence starting with "As Dr. Haas noted in his testimony . . .").
- ii. Page 80, last two lines (i.e., starting with "Appendix D, based on the same four hypothetical customers . . .") through the end of page 83 (i.e., ending with ". . . will reduce a customer's utility bill"), including footnotes 10 and 11.
- iii. Appendix B, Appendix C and Appendix D to Staff's Initial Brief.

In support of its Motion to Strike, Illinois Power states as follows:

1. Appendices B, C and D to Staff's Initial Brief purport to present an example of the billings to four hypothetical customers under Illinois Power's proposed demand charges and distribution capacity charges based on (i) IP's proposed standby

capacity reservation (“SCR”) provision and related provisions, and (ii) Staff’s position which does not include adoption of the SCR provision. The example presented on these Appendices includes assumptions as to the actual usage and SCR of each of the four hypothetical customers in each of the 12 months of the year. The assumptions used to prepare the Appendices are so extensive and complex that it takes almost two full pages of text in Staff’s Initial Brief (pp. 74-76) to explain them. The Appendices also show, with respect to demand charges, the annual billing units under various assumptions or scenarios for each of the four hypothetical customers, the total annual bill of each of the four annual customers, the “effective billing rate” of each of the four customers, the “total annual bill with equitable treatment” for each of the four customers; and the “effective billing rate” under the Staff proposal for each of the four customers. In addition, the Appendices show, with respect to distribution [capacity] charges, the annual billing units based on actual peak demand, SG meter units, billing units under IP’s SCR proposal, total annual bill, “effective billing rate”, “total annual bill with equitable treatment”, and “effective billing rate with equitable treatment of SG”, for each of the four hypothetical customers. Obviously, it was necessary for someone to calculate many of the figures displayed on these Appendices. The portions of text cited in (i) and (ii) above constitute explanation of, discussion about, and argument based on, the information shown in Appendices B, C and D.

2. The information set forth in Appendices B, C and D, and the discussion of the examples presented in Appendices B, C and D in the text of Staff’s Initial Brief listed in (i) and (ii) above, are clearly evidentiary material, but none of it was offered into the record of this case, let alone admitted into evidence. Appendices B, C and D were not

presented in evidence in this case, nor were the examples they present submitted in evidence through the testimony or exhibits of any witness. Accordingly, none of Appendices B, C and D, nor the explanation and discussion of these Appendices, nor the argument based on the Appendices, is properly included in Staff's Initial Brief in this case. Section 200.800(a) of the Commission's Rules of Practice state that "Statements of fact in briefs and reply briefs should be supported by citation to the record." Appendices B, C and D to Staff's Initial Brief and the text explaining and describing these Appendices and the examples they present are not, and cannot be, supported by citations to the record because none of this information is included in the record.

3. Staff's Initial Brief, at page 74, states that the example presented in Appendices B, C and D, and explained and discussed in the text referenced in (i) and (ii) above, is based on a hypothetical example presented by IP witness Leonard Jones in IP Exhibit 6.13, which was an exhibit submitted with Mr. Jones' rebuttal testimony. The fact that the example in Appendices B, C and D of Staff's Initial Brief purports to be based on the example presented in IP Exhibit 6.13 provides further reason for striking this material from Staff's Initial Brief. As noted, IP Exhibit 6.13 was presented in IP's rebuttal filing in this case. Under the procedural schedule in this case, Staff (and other parties) then had the opportunity to file rebuttal testimony in response to IP's rebuttal. In fact, Howard Haas, the Staff witness on the SCR issue, did file rebuttal testimony (Staff Ex. 18.0). However, Mr. Haas did not comment in his rebuttal testimony on the example presented by Mr. Jones in IP Exhibit 6.13.

In fact, the example in IP Exhibit 6.13 related to IP's proposed distribution capacity charge and was presented in response to Staff witness Lazare's opposition to the

distribution capacity charge. (See IP Ex. 6.6, pp. 19-20) IP Exhibit 6.13 was not presented in support of IP's SCR proposal. However, IP witness Jones did present a two-customer example relating to the SCR proposal in his rebuttal testimony, at pages 25-26 of IP Exhibit 6.6. Staff witness Haas, in his rebuttal testimony, commented extensively on the example presented by Mr. Jones at pages 25-26 of Mr. Jones' rebuttal testimony (see Staff Ex. 18.0, p. 16, line 348 through p. 18, line 392). However, even though he had the opportunity in his rebuttal testimony to do so, Staff witness Haas presented no counter-examples to either the example discussed at pages 25-26 of IP Exhibit 6.6, or to the example presented in IP Exhibit 6.13. Nor did Staff witness Haas present, in his rebuttal testimony, anything remotely resembling what is presented on Appendices B, C and D of Staff's Initial Brief. It is wholly inappropriate for Staff to be allowed to present this material, for the first time, in its Initial Brief.<sup>1</sup>

4. If Staff wanted to present the example in Appendices B, C and D and the discussion in the portions of its Initial Brief identified in (i) and (ii) above, Staff should have done so in its rebuttal testimony. By Staff's action of including this material in its Initial Brief for the first time, IP has been deprived of its rights to conduct discovery on this material, to cross-examine the sponsoring Staff witness, and to submit surrebuttal testimony on this example. Therefore, IP would be severely prejudiced if this material were allowed to remain in Staff's Initial Brief.

5. The Commission has included in its Rules of Practice Section 200.875, "Post-Record Data", setting forth the extremely limited circumstances under which, and

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<sup>1</sup> Both the example in IP Ex. 6.13 and the example at pp. 25-26 of IP Ex. 6.6 involved only two customers. Clearly, the example presented in Staff's Initial Brief, which involves four customers and necessitates two pages of textual explanation in Staff's Initial Brief, goes well beyond the examples presented in Mr. Jones's Initial Brief.

the purposes for which, parties may submit additional evidentiary material after the record has been marked “Heard and Taken”, and then only with permission of the Administrative Law Judge (“ALJ”). The material submitted by Staff in its Initial Brief in Appendices B, C and D and the related text does not qualify as “Post-Record Data” under Section 200.875. Nor has Staff requested that the ALJ admit this information as a late-filed exhibit (and if Staff were to so request, there would be no basis for granting that request).

6. Staff’s behavior in including in its Initial Brief the material that is the subject of this Motion to Strike is even more outrageous in light of the fact that several parties, including IP and Staff, requested leave at the last hearing in this case to submit certain exhibits after the hearings were completed and the record was closed in this case. Schedules were established and agreed to with respect to these exhibits for their circulation to other parties and for other parties to comment or indicate no objection. Staff, however, gave no indication of any intention to submit additional evidence such as is presented in Appendices B, C and D to its Initial Brief and the related text.

7. There is an additional reason for striking footnotes 8, 9 and 10 in Staff’s Initial Briefs. Each of these footnotes starts with a summary of a statement which Staff attributes to Mr. Jones “on redirect”, and then proceeds to make an argument in response to that purported statement. However, no transcript reference is provided for the purported statement (in direct violation of Section 200.800(a) of the Rules of Practice). Further, nowhere in the transcript of Mr. Jones’ redirect examination (Tr. 871-882) is any such statement made. Footnotes 8 through 10 therefore consist of argument in

response to a non-existent piece of testimony, and should be stricken for that reason as well.

8. Illinois Power requests that the ALJ set an expedited schedule for Staff's response to this Motion to Strike so that a ruling may be made by December 27, 2001, in order to spare IP the cost and inconvenience of having to respond in its reply brief to the material in Staff's Initial Brief that is the subject of this Motion to Strike. Any inconvenience to Staff resulting from having to comply with an expedited schedule for response is solely a situation of Staff's own making due to its inclusion of this patently objectionable material in its Initial Brief.

WHEREFORE, for the reasons set forth above, Illinois Power requests that the portions of Staff's Initial Brief listed in (i), (ii) and (iii) above be stricken.

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Respectfully submitted.

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